No. 98-712

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

CHARLES R. STRASBURGER,

Petitioner,

v.

BOARD OF EDUCATION, HARDIN COUNTY COMMUNITY UNIT SCHOOL DISTRICT NO. 1; HARDIN COUNTY EDUCATION ASSOCIATION OF THE ILLINOIS EDUCATION ASSOCIATION/ NATIONAL EDUCATION ASSOCIATION; DAN AUSTIN; DENNIS AUSTIN; DAN BRIDGES; and GERALD MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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17 pp

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding. There are no parents or nonwholly-owned subsidiaries of any of these respondents.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents ii

Table of Authorities iii

Statutes Involved 1

Statement of the Case 2

Reasons for Denying the Writ 5

1. This Petition Raises No Broad or Significant Issue of Law for this Court to Decide 5

2. This Case Presents Simply an Application of the Principles Enunciated by the Court in *Hudson v. Palmer* and *Parratt v. Taylor* 6

3. *Zinermon v. Burch* Does Not, and Should Not, Control This Case 7

4. Petitioner Has Not Suffered a Liberty Interest Deprivation 10

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994) 7, 10

Bishop v. Wood, 426 U.S. 341 (1976).....10, 12

Collins v. City of Harker Heights, 503 U.S. 115 (1992) 12

Costello v. Governing Bd. of Lee County Special Educ. Ass'n, 623 N.E.2d 966 (Ill.App.Ct. 1993), *appeal denied*, 633 N.E.2d 3 (Ill. 1994)..... 6

Daniels v. Williams, 474 U.S. 327 (1986)..... 8

Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) 9

Hudson v. Palmer, 468 U.S. 517 (1984) 5, 6, 7, 8

Parratt v. Taylor, 451 U.S. 527 (1981) *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986)..... *passim*

Paul v. Davis, 424 U.S. 693 (1976) 10

Siegert v. Gilley, 500 U.S. 226 (1991).....10, 11

Temple v. Bd. of Educ., 548 N.E.2d 640 (Ill.App.Ct. 1989)..... 6

Zinermon v. Burch, 489 U.S. 113 (1990).....5, 7, 8, 9, 12

STATUTES

42 U.S.C. § 1983 (1998) 7

105 Ill.Comp.Stat. 5/24-12 (West 1998)..... 1, 5, 9

STATUTES INVOLVED

In addition to the statutory and constitutional provisions provided by Petitioner, the following state statute is involved in this case:

105 Ill.Comp.Stat. 5/24-12 (West 1998) Removal or dismissal of teachers in contractual continued service

> Sec. 24-12. *Removal or dismissal of teachers in contractual continued service.* If a teacher in contractual continued service is removed or dismissed as a result of a decision of the board to decrease the number of teachers employed by the board or to discontinue some particular type of teaching service, written notice shall be mailed to the teacher and also given the teacher either by certified mail, return receipt requested or personal delivery with receipt at least 60 days before the end of the school term, together with a statement of honorable dismissal and the reason therefor, and in all such cases the board shall first remove or dismiss all teachers who have not entered upon contractual continued service before removing or dismissing any teacher who has entered upon contractual continued service and who is legally qualified to hold a position currently held by a teacher who has not entered upon contractual continued service. As between teachers who have entered upon contractual continued service, the teacher or teachers with the shorter length of continuing service with the district shall be dismissed first unless an alternative method of determining the sequence of dismissal is established in a collective bargaining agreement or contract between the board and a professional faculty members' organization. . . . If the board has any vacancies

> for the following school term or within one calendar year from the beginning of the following school term, the positions thereby becoming available shall be tendered to the teachers so removed or dismissed so far as they are legally qualified to hold such positions. . . .

STATEMENT OF THE CASE

Petitioner, Charles Strasburger, was hired by the Hardin County School Board, commencing with the 1991-1992 school year, to serve as Junior High Industrial Arts teacher, basketball coach, and athletic director. He was granted tenure in March, 1993. At the time he was hired, Petitioner did not disclose to the Board that he had an extensive criminal record in other states. R. 50, pp. 53-54. In June, 1978, Kentucky authorities had charged Petitioner with: three counts of burglary in the first degree, two counts of sexual abuse, three counts of criminal trespass in the third degree and three counts of disorderly conduct.[1] Of those charges, Petitioner was

[1] The police reports contain the following statements from the victims describing these crimes: "Complainant states that she was asleep in bed and was awakened by someone playing with her genital organ." "Complainant states that . . . she was in the bathroom of her apartment and when she turned around she observed a W/M subject standing there looking her. . . . " In addition, after being observed by police looking into two windows in an apartment building, the police report states that Mr. Strasburger confessed that he was "window peeping" because "now he was almost 32 years old, and his build wasn't as good as it was, and the girls didn't look as often, and it was depressing." Notes from one of the detectives investigating the

convicted of criminal trespass and three counts of disorderly conduct, and sentenced to a year in jail.

At some point after Petitioner was hired, the community and the school district became aware of his criminal past, and accurate copies of his criminal records began to circulate. On November 2, 1993, elections were held for the Board of Education. Petitioner's criminal record was discussed by voters, and possibly by candidates, during the campaign leading up to this election. R. 50, pp. 30-35.

On November 9, 1993, the Board of Education voted to suspend Petitioner *with pay* from his duties as coach and athletic director. R. 50, p. 67. The Board took that action in response to allegations of possible kickbacks regarding a tennis shoe contract and Petitioner's signing of a contract for an overnight basketball trip without authority. R. 50, p. 78. The Board suspended Petitioner from coaching and athletic director duties, with pay, pending an investigation into these allegations. He was not suspended from teaching. R. 50, p. 67. The investigation also included a review of the Petitioner's criminal record to determine if there were other convictions or arrests of which the Board had not previously known. R. 50, pp. 79-80. Contrary to the allegations in the Petition for Certiorari, the criminal background information was

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case also report that Mr. Strasburger's former employer in Tennessee reported that Mr. Strasburger was asked to resign because of several incidents in which he reportedly had been caught prowling around apartments, looking in windows, and trying doors. R. 58, pp. 11-17.

found to have been circulating generally within the community, and the courts specifically found that no stigmatizing information came from any individual board member. After the conclusion of the investigation, in December, 1993, Petitioner was reinstated to his athletic director and coaching duties. He suffered no loss of pay as a result of the suspension.

During the 1993-1994 school year, Petitioner was teaching three periods of Junior High Industrial Arts each day, with enrollment between five and ten students in each class. R. 50, p. 70. The average class size for other classes (excluding special education) at the time was over twenty students per class. *Id.* He was also supervising two periods of study hall and serving as athletic director and basketball coach. *Id.*

On March 10, 1994, the Board of Education voted to conduct a reduction in force ("RIF"), eliminating two positions, including the position for Junior High Industrial Arts. R. 50, p. 69.[2] Because Petitioner, although tenured, did not have the seniority and qualifications to bump any less senior teacher from his or her position for

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[2] The other position eliminated was held by Kathy Hanrahan, a music teacher. Due to a vacancy created when another music teacher left, Ms. Hanrahan was offered the opportunity, in the summer of 1994, to fill that vacant position. However, there was one fewer music position in the District subsequent to the RIF. According to the District's records, this was not the first RIF in thirteen years, as Petitioner claims. One board member could not recall the other RIFs during his deposition. However, to the extent there is a possible dispute over this point, it is not material to the legal issues in dispute and therefore did not preclude summary judgment.

the 1994-1995 school year, he was honorably dismissed from service with the school district, effective June 30, 1994, in accordance with the provisions of Section 24-12 of *The School Code*, 105 Ill.Comp.Stat. § 5/24-12 (West 1998). Since that time, Junior High Industrial Arts has never been offered in the school district. The Board also voted, on March 31, 1994, not to rehire Petitioner as athletic director and basketball coach for the 1994-1995 school year. *Id.* These positions had been one year positions.

Petitioner completed the school year, and was hired by another school district as a teacher for the following school year. R. 50, pp. 28-29. He left that position in 1995 to work for the State of Illinois, in a position that pays a higher salary than the position he lost in Hardin County. R. 50, p. 48.

REASONS FOR DENYING THE WRIT

1. This Petition Raises No Broad or Significant Issue of Law for this Court to Decide.

The Petition raises only a narrow question of the application of *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Zinermon v. Burch*, 489 U.S. 113 (1990), in a situation in which individual school board members who dislike a teacher may have abused the state's statutory reduction in force procedure. Both parties agree that state remedies are available and would be adequate to redress the underlying claim of wrongful

discharge.[3] There is no conflict among the circuit courts, nor any conflict between the decision below and the precedents of this Court.

2. This Case Presents Simply an Application of the Principles Enunciated by the Court in *Hudson v. Palmer* and *Parratt v. Taylor*.

This case is plainly controlled by this Court's decisions in *Hudson v. Palmer*, 468 U.S. 517 (1984) and *Parratt v. Taylor*, 451 U.S. 527 (1981). In *Parratt*, this Court held that the unauthorized negligent acts of a prison guard did not create a cause of action for violation of the Fourteenth Amendment where the State provides adequate post-deprivation remedies. *Hudson* extended this proposition to intentional conduct. In *Hudson*, the petitioner, a prisoner, brought a claim against state officials for intentionally depriving him of his property, in contravention of the Fourteenth Amendment's due process guarantee. This Court held that an unauthorized intentional act by an individual state official or employee to deprive someone of property is not cognizable under the Due Process Clause if adequate state remedies exist. In *Hudson*, as in

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[3] Illinois courts have long recognized a wrongful discharge action to review an allegedly improper reduction in force. Had Petitioner been successful, he could have been reinstated to his position with full back pay. *See Temple v. Bd. of Educ.*, 548 NE.2d 640 (Ill.App.Ct. 1989); *Costello v. Governing Bd. of Lee County Special Educ. Ass'n*, 623 N.E.2d 966 (Ill.App.Ct. 1993), *appeal denied*, 633 N.E.2d 3 (Ill. 1994).

this case, the petitioner alleged that the state actor intentionally chose to violate state law by wrongfully depriving him of property (legal papers in *Hudson*, the property interest in his job in the present case). In both cases, the allegation is that, due to a desire for personal harassment, the state actor chose to disregard the requirements of state law (by improperly seizing papers in *Hudson*, and in the present case by voting for the RIF in order to get rid of Petitioner rather than out of a desire to eliminate the position). The result, too, should be the same.

As this Court held in *Hudson*, "the state can no more anticipate and control in advance the unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." 468 U.S. at 533. Thus, because adequate state remedies are available here, as they were in *Hudson* and *Parratt*, no due process action is available. "In the ordinary case where an injury has been caused not by a state law, policy or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment *simpliciter*.' " *Albright v. Oliver*, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring), *quoting Parratt v. Taylor*, 451 U.S. at 536.

3. *Zinermon v. Burch* Does Not, and Should Not, Control This Case.

Petitioner is asking this Court to extend its ruling in *Zinermon v. Burch*, 489 U.S. 113 (1990), and by extension, to cut back significantly on its decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517

(1984), and *Daniels v. Williams*, 474 U.S. 327 (1986). As the District Court and the Seventh Circuit Court of Appeals correctly concluded, *Zinermon* is inapplicable to this case. *Zinermon* was a challenge to the validity of the underlying state voluntary commitment statute. There is no challenge to the validity of the Illinois RIF statute in this case. Further, the courts found that the RIF, on its face, fully complied with the statutory requirements for the elimination of a position. The only allegation is that certain individual members of a seven-member school board had a personal vendetta against Petitioner, and they voted to eliminate the position of Junior High Industrial Arts teacher as a pretext to remove him from the school district.

This alleged misuse of the constitutionally unchallenged RIF statute was not one that the state could either foresee or prevent. Although the state might be able to foretell that an abuse might one day occur somewhere in the state, it could not determine when or where such an abuse would happen. Further, as in *Parratt* and *Hudson*, but unlike *Zinermon*, there are no effective predeprivation procedures that can prevent an intentional misuse of the situation by an individual board member with bad motives for voting in favor of a RIF that, on its face, fully complies with the statutory requirements. As Justice O'Connor noted in her dissent in *Zinermon*, "for deprivations worked by such random and unauthorized departures from otherwise unimpugned and established state procedures the State provides the process due by making available adequate post deprivation remedies." 494 U.S. at 141 (O'Connor, J., dissenting).

In *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc), the Seventh Circuit explored the effect of the *Zinermon* decision, noting that "the dispositive factor in determining whether *Parratt* will indeed apply in a given situation is still whether the state actor's conduct is 'random and unauthorized.' " 910 F.2d at 1400. In discussing the scope of the *Zinermon* decision, the appellate court stated that "*Zinermon* holds only that predictable deprivations of liberty or property which flow from authorized conduct are compensable under Section 1983." 910 F.2d at 1402. By "predictable," the Court meant that the nature of the state's underlying statutory scheme must make it predictable that violations of the sort complained of would occur on an ongoing basis. There is no evidence in the present case that the state's RIF statute makes malicious RIFs predictable. To the contrary, the statute limits RIFs to objectively verifiable situations in which two conditions must be met: 1 either the total number of teachers is to be reduced or a particular type of teaching service is to be eliminated; and 2 dismissal will occur in reverse seniority order among those eligible. 105 Ill.Comp.Stat. 5/24-12 (West 1998). The likelihood of misuse of the statutory authority is thus remote and not predictable. Accordingly, *Zinermon* is not applicable here.

Petitioner is seeking an extension of this Court's holding in *Zinermon* in order to overrule *Parratt v. Taylor*, and to return to the federal courts' docket all cases in which individual officials misapply state statutes, even though the misapplication was unauthorized by the state statute, unpredictable, and even though the state provides an adequate state remedy to redress the deprivation of rights protected by the state statute. As this Court has

repeatedly held, this would be an inappropriate allocation of limited federal judicial resources. *Albright v. Oliver*, 510 U.S. 266, 284 (1994); *Parratt*, 451 U.S. at 544; *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976); *Paul v. Davis*, 424 U.S. 693, 698-99 (1976).

4. Petitioner Has Not Suffered a Liberty Interest Deprivation.

Although not identified in his Questions Presented, on page 14 of his Petition, Petitioner asks this Court to review the decision of the courts below that Respondents did not violate Petitioner's constitutionally protected liberty interest. The Petition limits this claim to a single statement, uttered in a private conversation between the board president and another individual in the community. Petitioner does not allege that the reports of his criminal misconduct are false, and therefore he does not rely on the dissemination of those to support his claim of a liberty interest violation.

In order to succeed on such a claim, Petitioner must establish: (1) that a government official made false, stigmatizing statements about him; (2) that these statements were made in connection with the termination of his employment; and (3) that these statements foreclosed him from other government employment. *Siegert v. Gilley*, 500 U.S. 226 (1991); *Paul v. Davis*, 424 U.S. 693 (1976). In this case, none of these elements was established. First, the remark at issue was not a stigmatizing statement of fact. Rather, it was the opinion of one individual board member based on the widely disseminated and discussed criminal record of the Petitioner. A stigmatizing statement requires a misstatement of fact, not merely an

unflattering opinion. Further, since there is no evidence that any potential future employer knew of or acted on this remark, it is insufficient to support a liberty interest claim.

In addition, a petitioner claiming a violation of a liberty interest by a public employer must demonstrate that the allegedly stigmatizing remarks were "uttered incident to the termination of [Petitioner's] employment," as required by *Siegert*, 500 U.S. at 234. As previously discussed, Petitioner's termination arose from a decision by the Board to eliminate the position of Junior High industrial arts teacher, the position filled by Petitioner. Petitioner produced no evidence in the District Court that the remark was made in connection with the RIF.

In *Siegert, supra*, this Court rejected a liberty interest claim where the petitioner, a former government employee, claimed that a stigmatizing letter of recommendation from his former employer, a federal hospital, had cost him a job at another public institution. The Court found that the letter, written a few days after petitioner voluntarily resigned, would "undoubtedly damage the reputation of one in his position, and impair his future employment prospects. . . . But so long as such damage flows from injury caused by the defendant to a petitioner's reputation, . . . it is not recoverable [in a due process action]." 500 U.S. at 234. Furthermore, in this case, unlike in *Siegert*, Petitioner has not been foreclosed from government employment. To the contrary, Petitioner has been continuously employed since the RIF. He worked first for another school district as a teacher, and then resigned to work for the State of Illinois in an educational position. R. 50, pp. 28, 48.

Petitioner also asserts that this Court should look at a broad range of conduct, in addition to the comments made by an individual member, to determine whether he has been stigmatized by Respondents. Since Petitioner cannot establish any of the other elements of a liberty interest claim, as discussed above, it is not necessary for the Court to address this issue.

CONCLUSION

This Court has repeatedly cautioned that " '[t]he Due Process Clause' is not a guarantee against incorrect or ill-advised personnel decisions." *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992), *citing Bishop v. Wood*, 426 U.S. 341, 350 (1976). Petitioner is seeking to "constitutionalize" a simple state wrongful discharge action, by asking this Court to expand *Zinermon v. Burch*, 489 U.S. 113 (1990), to the point of overruling *Parratt v. Taylor*, 451 U.S. 527 (1981). There is no need to burden the federal

courts with the job of reviewing all state RIF decisions. The Petition for Certiorari should be denied.

Respectfully submitted,

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Dated: December 1, 1998